

REDACTED - FOR PUBLIC INSPECTION

April 28, 2010

VIA COURIER

NOTICE OF EX PARTE PRESENTATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area, WC Dkt. No. 09-135*

Dear Ms. Dortch:

Yesterday, the undersigned, outside counsel to Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp., met with Jay Atkinson, Denise Coca, Margaret Dailey, Bill Dever, John Hunter, Marcus Maher, Pam Megna, Jennifer Prime, Cathy Seidel, Tim Stelzig, and Don Stockdale of the Wireline Competition Bureau regarding the above-referenced proceeding.

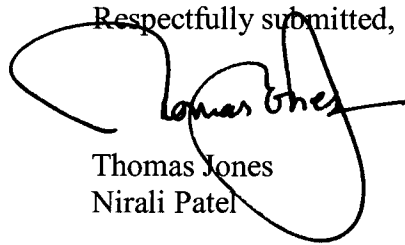
The participants discussed how: (1) when evaluating Qwest's petition for forbearance from unbundling obligations in the Phoenix MSA, the Commission should apply a standard of review based on sound principles of competition policy; and (2) regardless of the standard applied, the record evidence shows that Qwest's petition should be denied.

Please find enclosed for filing two copies of the redacted version of the confidential and highly confidential presentation document that was distributed at the meeting. Pursuant to the *Second Protective Order* in this proceeding, one copy of the confidential and highly confidential presentation document that was distributed at the meeting is being filed today with the Secretary's Office under separate cover and one copy of the confidential and highly confidential presentation document will be provided to Gary Remondino of the Wireline Competition Bureau.

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Please do not hesitate to contact me if you have any questions or concerns about this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas Jones", is written over the typed name and the word "Patel". The signature is stylized with a large loop at the beginning and a horizontal line extending to the right.

Thomas Jones
Nirali Patel

*Counsel for Integra Telecom, Inc., tw telecom inc.,
Cbeyond, Inc., and One Communications Corp.*

Enclosure

cc (via email): Jay Atkinson
Denise Coca
Margaret Dailey
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Cathy Seidel
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Don Stockdale

**INTEGRA TELECOM, TW TELECOM, CBeyond, AND ONE COMMUNICATIONS
PRESENTATION REGARDING QWEST PHOENIX MSA FORBEARANCE PETITION
WC Dkt. No. 09-135
April 27, 2010**

**I. WHEN EVALUATING QWEST'S PETITION FOR FORBEARANCE FROM UNBUNDLING
OBLIGATIONS IN THE PHOENIX MSA, THE COMMISSION SHOULD APPLY A STANDARD OF
REVIEW BASED ON SOUND PRINCIPLES OF COMPETITION POLICY.**

1. The D.C. Circuit's opinion in *Verizon v. FCC* confirms that the Commission has substantial discretion in determining the appropriate standard of review for UNE forbearance petitions. *See Verizon v. FCC*, 570 F.3d 294, 304-05 (D.C. Cir. 2009).
2. The Commission should define product markets based on customer demand patterns, and at a minimum, differentiate the residential market from the business market and the retail market from the wholesale market. *See Opposition of Integra Telecom, Inc. et al.*, at 7-8 (filed Sept. 21, 2009) ("Joint Commenters' Opposition").
3. The Commission should also assess competition on an MSA basis because competitors that rely on UNEs must obtain access to those facilities throughout an MSA in order to achieve profitability and to serve a community of interest. (This is the case for Integra in the Phoenix MSA. *See Joint Commenters' Opposition* at 8-9 & Attachment A, Cantrall Declaration ¶¶ 4-5.) Accordingly, the competitive effects of eliminating UNEs should be assessed on an MSA basis.
4. When assessing the level of competition in each relevant market, the Commission should apply the standard proposed by a coalition of competitors in related forbearance proceedings (the "Competitors' Proposed Standard") or a market competition standard based on the FTC-DOJ Horizontal Merger Guidelines (a "Market Competition Standard"). *See Joint Commenters' Opposition* at 9-11.
 - a. In assessing competition under the Competitors' Proposed Standard, the Commission should determine, for each MSA in which forbearance is sought, whether:
 - (1) there are at least two facilities-based non-ILEC wireline competitors in the wholesale loop market, each of which has actually deployed end-user connections to 75 percent of end-user locations, each of which has deployed wholesale operations support systems sufficient to support the wholesale demand in the relevant product market, and each of which has garnered at least 15 percent of wholesale loop market share in the relevant product market ("Wholesale Test");
 - or
 - (2) at least 75 percent of end-user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the

relevant downstream product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based competitors to the ILEC that have each garnered at least 15 percent of retail market share in the relevant product market (“Retail Test”).

- (i) The Competitors’ Proposed Standard could be applied as a presumption test under which an MSA that meets the criteria would be presumed to be eligible for forbearance and an MSA that does not meet the criteria would be presumed to be ineligible for forbearance.
- b. Under a Market Competition Standard, forbearance would be granted in the relevant product market in an MSA only where facilities-based competition is sufficient to prevent the incumbent LEC from exercising market power unilaterally or as a result of coordinated conduct.
 - (i) Pursuant to the FTC-DOJ Horizontal Merger Guidelines, potential entry would be considered in the Commission’s analysis only if such entry is likely, timely, and sufficient. Because it is extremely unlikely that the Commission could conclude that a prospective entrant into the markets at issue in UNE forbearance proceedings meets these criteria, the Commission should presume that only actual competition is relevant.
 - (ii) In assessing actual competition, the Commission should require that (1) the incumbent LEC faces competition from at least two competitors that utilize their own loop facilities to provide service throughout the MSA, and (2) there are at least two competitors with their own loops that have garnered substantial market share (e.g., 15 percent).

II. REGARDLESS OF THE STANDARD APPLIED, THE RECORD EVIDENCE SHOWS THAT QWEST’S PETITION FOR FORBEARANCE FROM UNBUNDLING OBLIGATIONS IN THE PHOENIX MSA SHOULD BE DENIED.

A. There Is Insufficient Facilities-Based Competition In The Retail Business Market In The Phoenix MSA To Justify Forbearance.

- 1. Qwest’s business market share data is flawed and unreliable.—Qwest has submitted data from a Harte Hanks survey in which 1,500 businesses in the Phoenix MSA were purportedly asked to identify their primary telecommunications provider. *See* Qwest Petition at 27, Brigham Declaration ¶ 33 & Confidential Exhibit 6.
 - a. This data cannot be used to estimate facilities-based competitors’ market share because it includes competitors that provide service using Qwest’s own loop facilities. *See* Joint Commenters’ Opposition at 21 (citing *4 MSA Order* ¶ 41); *see also* COMPTTEL Comments at 39.
 - b. In addition, as other commenters have noted, Qwest has not provided the actual survey results, the text of the survey question(s), the methodology used to select

the survey respondents, the type or level of personnel that answered the survey question(s), or any other information to support the reliability of the survey. *See, e.g.,* Ad Hoc Comments at 5; COMPTel Comments at 39.

2. Competitors face competition primarily from Qwest, not Cox.—Contrary to Qwest’s unsubstantiated claim that Cox “competes vigorously with Qwest in the business market” (Qwest Petition at 27), Integra has found that most of the competition it faces in the retail business market in the Phoenix MSA comes from Qwest, not Cox. *See* Joint Commenters’ Opposition, Attachment D, Fisher Declaration ¶ 12.
 - a. For instance, in the northern portion of the Phoenix MSA, Integra faces competition from Cox only in the provision of very high-end services (e.g., 100 Mbps Ethernet service). *See id.*
 - b. In addition, during the first six months of 2009, Integra ported out numbers *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** to Qwest than to Cox. *See id.* ¶ 13.
3. The ACC’s data confirms that Qwest, not Cox, dominates the business market.—According to the Arizona Corporation Commission (“ACC”), “Cox is not as significant a player in the overall business market at this time The data collected by the ACC indicates that Qwest is by far the dominant facilities-based carrier yet in the business or enterprise market.” *See* ACC Late-Filed Reply Comments at 21.
 - a. Specifically, the ACC’s data shows that *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** *See id.*, Highly Confidential Exhibits 7-8.
 - b. According to the ACC, *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** *See id.*, Highly Confidential Exhibits 7 & 9.
 - c. The ACC has also found that *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** *See id.*, Highly Confidential Exhibits 7 & 10.
4. The GeoTel competitive building data submitted by Qwest does not support forbearance.—Qwest submits that, according to “GeoTel, August 2008,” *****BEGIN CONFIDENTIAL***** *****END CONFIDENTIAL***** commercial

buildings in the Phoenix MSA were served by competitive fiber. *See* Qwest Petition at 30-31.

- a. This estimate is hard to credit because Qwest fails to provide the total number of commercial buildings in Phoenix as a basis for comparison. *See 4-MSA Order* ¶ 40.
- b. In fact, according to GeoResults, there were 127,763 total commercial buildings in the Phoenix MSA as of March 25, 2008. *See* Joint Commenters' Opposition n.32. Accordingly, based on Qwest's GeoTel estimate of on-net competitor buildings and GeoResults data for total commercial buildings, the percentage of all commercial buildings in the Phoenix MSA served by competitive fiber in 2008 is only [***BEGIN CONFIDENTIAL***] [***END CONFIDENTIAL***]. Moreover, according to GeoResults, there were [***BEGIN HIGHLY CONFIDENTIAL***]

[***END HIGHLY CONFIDENTIAL***] *See id.*, Attachment C, Liestman Declaration ¶ 8, Table 1. Accordingly, even if Qwest's GeoTel estimate of on-net competitor buildings is compared to GeoResults data for total commercial buildings with two DS1s of demand or more in the Phoenix MSA, the percentage of commercial buildings with two DS1s of demand or more in the Phoenix MSA served by competitive fiber is only [***BEGIN HIGHLY CONFIDENTIAL***] [***END HIGHLY CONFIDENTIAL***]

5. The assorted competitive fiber network data submitted by Qwest does not support forbearance.—Qwest proffers the number of miles of fiber owned by CLECs in the Phoenix MSA and maps purportedly showing that “the Phoenix MSA is very saturated with competitive fiber facilities.” *See* Qwest Petition at 30-31.
 - a. However, the fact that competitors have deployed fiber *near* commercial buildings does not mean that competitors can actually deploy loops *to* those buildings. *See 4-MSA Order* ¶ 36 & n.135 (finding that even where buildings are located within 300 or 1000 feet of a competitor's fiber network, “it frequently would not be economically feasible to construct loops over that distance in the absence of a demand level that exceeds levels for which UNEs are available”).
 - b. Thus, Qwest's claim that “most ‘unlit’ buildings [in the Phoenix MSA] could be ‘lit’ simply by extending a lateral facility less than 1,000 feet from a fiber ring” (Qwest Petition at 31) must be dismissed.
6. Competitors' experience confirms the lack of intramodal, facilities-based competition in the business market.—The experience of Integra, tw telecom, and other competitors shows that there is little actual facilities-based competition in the business market in the Phoenix MSA. *See, e.g.,* Joint Commenters' Opposition at 15-17.

- a. For example, due to a number of real-world obstacles to self-deployment (e.g., the monthly recurring revenue required to justify loop construction to a particular building, lack of conduit space, municipalities' unwillingness to grant rights-of-way, and franchise fees for laying fiber), Integra has constructed loop facilities to only *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** buildings in the Phoenix MSA as of April 27, 2010. *See also id.*, Attachment B, Bennett Declaration ¶¶ 4-5 (discussing obstacles to self-deployment).
 - b. Because of similar factors, as of the end of the first quarter of 2010, tw telecom had constructed loops to only *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** of its customer locations in the Phoenix MSA. As of July 2009, tw telecom had constructed loops to only *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL*****
See id., Attachment C, Liestman Declaration ¶ 8, Table 1. As of the end of the first quarter of 2010, tw telecom had constructed loops to only *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** and thus, tw telecom's market penetration has not changed significantly.
 - c. According to XO Communications, "XO has its own facilities connected only to *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** commercial buildings in the Phoenix MSA, only *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** of all commercial buildings in the market." Initial Comments of Broadview Networks, Inc. et al. at 48-49 (emphasis in original). Furthermore, according to XO, "[a]dding additional buildings is a costly venture which XO undertakes only after developing a strong business case and a demonstrated capacity need of at least 3 DS-3s." *Id.* at 49.
7. The ACC's data confirms the lack of intramodal, facilities-based competition in the business market.—The ACC's data demonstrates that there is little facilities-based competition in the business market in the Phoenix MSA. *See* ACC Late-Filed Reply Comments, Highly Confidential Exhibit 7.
- a. The ACC has concluded that "[t]he extensive intramodal non-Qwest facilities competition that Qwest cites to in its Petition for the business market is not borne out by the data collected by the ACC." *Id.* at 22.
 - b. Instead, the ACC has determined that "[w]hile intramodal competition exists, the evidence in the record already and the data collected by the ACC, indicate that it is by and large non-facilities based and relies primarily upon Qwest's facilities." *Id.* at 9.

B. There Is Insufficient Facilities-Based Competition In The Wholesale Business Market In The Phoenix MSA To Justify Forbearance.

1. Cox is not a significant or viable alternative wholesale provider.

- a. In support of its claim that Cox is a significant alternative wholesale provider of loops and transport in the Phoenix MSA, Qwest proffers nothing but the exact same information from Cox's website that it submitted—and that the Commission rejected—in the 4-MSA proceeding. *See* Joint Commenters' Opposition at 18 & n.49 (citing *4-MSA Order* n.137).
- b. In Integra's experience, Cox is not a viable alternative to Qwest for the wholesale loops needed to serve Integra's business customers in the Phoenix MSA because (1) Cox offers wholesale access only to the relatively limited number of buildings served by its fiber loop facilities and not to buildings served by its coaxial loop facilities; (2) Cox's prices for wholesale loop facilities are high in the limited number of locations in which it offers such facilities (e.g., *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL*****); and (3) Cox's wholesale OSS capabilities have serious limitations (e.g., in Integra's experience, wholesale customers cannot order loops electronically). *See id.* at 18-19 & Attachment D, Fisher Declaration ¶¶ 7-9.
- c. Data submitted by CLECs to the ACC confirms that Cox is not a significant alternative provider of loops or transport in the Phoenix MSA.

(i) For example, *****BEGIN HIGHLY CONFIDENTIAL*****

(ii)

*****END**

HIGHLY CONFIDENTIAL*** *See* ACC Late-Filed Reply Comments, Highly Confidential Exhibit 15.

2. SRP Telecom and AGL Networks are not significant alternative wholesale providers of loops and transport.

- a. According to Qwest itself, SRP serves only "50 on-net commercial buildings" in the Phoenix MSA and AGL has only "64 specific in-service or pending building locations in the Phoenix area." *See* Qwest Petition at 34-35.
- b. According to the ACC, "the data collected by the ACC[] indicates that the number of buildings served by [SRP and AGL's] networks is extremely limited at this time." *See* ACC Late-File Reply Comments at 22 & Highly Confidential Exhibit 14 (showing *****BEGIN HIGHLY CONFIDENTIAL*****)

[***END HIGHLY

CONFIDENTIAL***]

3. None of the CLECs cited by Qwest are significant alternative wholesale providers of loops and transport.—To support its claim that “there are numerous wholesale providers serving carriers in the Phoenix MSA” (Qwest Petition at 38), Qwest cites to GeoTel’s estimates of the route miles of fiber deployed by Integra, tw telecom, and other CLECs. *See id.* at 35-37.
 - a. As explained above, however, Integra and tw telecom’s networks reach only a limited number of buildings in the Phoenix MSA.
 - b. Moreover, while Qwest claims that “Integra/ELI is a major provider of wholesale carrier services in the Phoenix MSA” (*id.* at 36), data submitted by CLECs to the ACC shows that [***BEGIN HIGHLY CONFIDENTIAL***]

[***END HIGHLY CONFIDENTIAL***] *See id.*